93-1164 (4)

No. 91-192

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IN THE

Supreme Court of the United States

October Term, 1993

THERESA A. LaPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods, Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LaPAGE, Individually,

Petitioners,

against

LYNNE Di COSTANZO, M.D., REUVEN LEVY, P.C. and ALICE HYDE MEMORIAL HOSPITAL,

Respondents.

APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT REUVEN LEVY, PHYSICIAN, P.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether there exist independent and adequate state grounds for the decision of the Appellate Division, Third Department affirming the dismissal of Petitioners' cause of action for wrongful death, asserted by the personal representatives of a stillborn fetus?

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BRIEF OF RESPONDENT REUVEN LEVY, P.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

United States Code: 28 USC 1257(a)

New York Statutes: CPLR § 5601(b)(1)
CPLR § 5602(a)(1)(i)

STATEMENT OF THE CASE

This is an action for alleged medical malpractice. The facts are largely undisputed.

Theresa A. LaPage was admitted to the Defendant-Respondent Alice Hyde Memorial Hospital on February 9, 1989 for obstetrical care. At 5:33 P.M. an internal fetal monitor was placed. It was removed at 6:25 P.M. when Ms. LaPage was moved from the obstetrics floor to an operating room. Defendant-Respondent Reuven Levy, M.D. was called to assist Defendant-Respondent Lynne DiCostanzo, M.D. in the performance of an emergency cesarean section upon Ms. LaPage. He first saw Ms. LaPage on February 9th when she arrived in the operating room.

Ms. LaPage was anesthetized at 6:35 p.m. At 6:43 P.M. a stillborn fetus was delivered. All parties have agreed that the fetus was, in fact, stillborn.

This action was commenced in the Supreme Court, Franklin County, State of New York by service of a summons and complaint alleging two causes of action. First, Petitioners have asserted a cause of action for the alleged wrongful death and conscious pain and suffering of the stillborn infant. The alleged cause of action for wrongful death is governed by EPTL § 5-4.1. Second, Petitioner Theresa LaPage claims a cause of action for the physical and emotional injuries she allegedly suffered as a result of the Respondents' negligent performance of the cesarean section on February 9, 1989.

In the Supreme Court, Respondents moved for the summary judgment dismissal of Petitioners' first cause of action. In support of their motion Respondents argued that the alleged infant plaintiff was not born alive and that the law of New York unequivocally bars recovery under the wrongful death statute by the personal representative(s) of a stillborn fetus which allegedly died as a result of injuries received while en ventre sa mere. In an Order dated September 4, 1992, the Honorable Jan H. Plumadore, Supreme Court, Franklin County dismissed Petitioners' first cause of action for the alleged wrongful death and conscious pain and suffering of the stillborn fetus.

Petitioners appealed to the Supreme Court, Appellate Division, Third Department as of right, pursuant to applicable provisions of Article 55 of New York's Civil Practice Law and Rules. In their Memorandum and Order entered on June 17, 1993, the Appellate Division, Third Department affirmed the lower court, confirming the validity of a long line of precedent refusing to extend a cause of action for wrongful death in New York to the personal representative(s) of a stillborn fetus. The Appellate Division empha-

sized that any reconsideration of the rule established in this precedent would be a task for New York's Court of Appeals or the New York Legislature. (Petitioner's Appendix, A5-A7)

Petitioners next sought an appeal as of right to New York's highest court, the Court of Appeals. Petitioners sought this appeal pursuant to CPLR § 5601(b)(1), which allows an appeal from an order of the Appellate Division finally determining an action where there is directly involved a substantial constitutional (New York or federal) question.

On September 14, 1993, the Court of Appeals dismissed Petitioners request for an appeal as of right. The Court based its dismissal "upon the ground that no substantial constitutional question is directly involved." (Petitioner's Appendix, A4)

Petitioners next made a motion seeking permissive leave to appeal to the Court of Appeals, presumably pursuant to CPLR § 5602(a)(1)(i). In a decision dated December 15, 1993, the Court of Appeals denied Petitioners motion for leave to appeal. (Petitioner's Appendix, 3).

Petitioners now seek a writ of certiorari.

SUMMARY OF ARGUMENT

The Supreme Court is without jurisdiction to grant certiorari in this case because the state court decision below rests upon independent and adequate state grounds. The court below dismissed Petitioners' first cause of action in

which they alleged a cause of action for wrongful death as the personal representatives of a stillborn fetus. The state court decision was based on a long and consistent line of precedent construing New York's wrongful death statute, itself a legislative creation, to forbid such claims.

The lower court did not raise any federal constitutional issues in its decision. Nor is federal law presented as a decisional underpinning in the long line of precedent consistently construing New York's wrongful death statute since its inception in 1847 to forbid the personal representative of a stillborn fetus a cause of action for wrongful death.

The presumption favoring certiorari established in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1983) does not apply in this case because the state court decision neither rests primarily on nor is interwoven with federal law; and because the adequacy of the state law rationale is clear from the face of the opinion. The lower court decision is neither formulary nor obfuscatory in its reliance on state law to decide the instant question.

Petitioners argue that United States Supreme Court decisions render New York's rule "constitutionally wrong" because a woman's right to terminate an unwanted pregnancy "only exists in pre-viability cases." They fail to grasp the import of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny; particularly *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2821 (1992). The Supreme Court has unequivocally ruled that the word "person", as used in the Fourteenth Amendment, and "person" as it is used in nearly every instance in the United States Constitution do not include the unborn. *Roe v. Wade*, *supra*, 410 U.S. at 158; *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), *cert. denied Illinois Pro-Life*

Coalition, Inc. v. Keith, 474 U.S. 980 (1985). These cases clearly do not require New York to reverse its longstanding refusal to allow the personal representatives of a stillborn fetus to sue for wrongful death.

The predicate to Supreme Court review by certiorari, the presence of an issue of federal law an ' the absence of an independent and adequate state ground for the decision do not exist in this case. It is, therefore, respectfully requested that certiorari be denied the Petitioners.

ARGUMENT

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT CERTIORARI BECAUSE THE DECISION BELOW RESTS UPON INDEPENDENT AND ADEQUATE STATE GROUNDS

Respect for the independence of state courts, general unfamiliarity with state laws, and a desire to avoid rendering advisory opinions have been the basis for the Supreme Court's refusal to decide cases where there is an independent and adequate state ground for the decision below. *Illinois v. Rodriguez*, 110 S.Ct. 2793 (1990); *Michigan v. Long*, 463 U.S. 1032, 1040, 103 S.Ct. 3469, 3476 (1983). In such cases, the Supreme Court will not undertake to review any federal issue because its resolution would not affect the judgment in any way, amounting to nothing more than an advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 125-26, 65 S.Ct. 459, 462-64 (1945). Thus, it has been clearly established that the Supreme Court will "not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of

the federal question and adequate to support the judgment." *Coleman v. Thompson*, 111 S.Ct. 2546, 2553-54 (1991) (*referring to Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184 [1935]); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.Ed. 635 (1872).

This rule applies whether the state law ground is procedural or substantive. *See, e.g., Fox Film, supra*; *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794 (1935). The independent and adequate state ground doctrine has been held to apply in direct review proceedings, and is jurisdictional. *See Coleman v. Thompson, supra*, 111 S.Ct. at 2554. Finally, it is incumbent upon the Supreme Court to ascertain for itself whether the asserted non-federal ground adequately supports the judgment below. *Michigan v. Long*, 463 U.S. 1032, 1038, 103 S.Ct. 3469, 3475 (1983). The standard of review will be *de novo*. *Howlett by and through Howlett v. Rose*, 110 S.Ct. 2430, 2437 (1990).

The facts of this case lend themselves to a simple and straightforward application of the independent and adequate state ground doctrine. The opinion of the Appellate Division, Third Department contains no discussion of federal law, makes no reference or citation to federal law, and clearly invokes state case law construing New York's wrongful death statute as the rationale for its decision. Further, the Appellate Division, Third Department did not raise any federal constitutional issues in its opinion. Nor is federal law presented as a decisional underpinning in the long line of precedent consistently construing New York's wrongful death statute since its inception in 1847 to forbid the personal representative of a stillborn fetus that dies as a result of injuries received while *en ventre sa mere* a cause of action for wrongful death. *See Endresz v. Friedberg*, 24

NY2d 478 (1969) (*referring to Milks v. McIver,* 264 N.Y. 267, 269 (1934) for the rule that "liability for damages caused by wrong ceases at a point dictated by public policy or common sense.")

THE LONG PRESUMPTION DOES NOT APPLY IN THIS CASE BECAUSE THE ADEQUACY AND INDEPENDENCE OF THE STATE LAW GROUND IS CLEAR IN THE OPINION BELOW

In 1983 there was established a conclusive presumption to be applied in certain direct review cases to address the problem presented by ambiguous state court decisions in applying the independent and adequate state ground doctrine. *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469 (1983).

> [W]hen,...,a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the way it did because it believed the federal law required it to do so. *Id.*, at 1041, 103 S.Ct. at 3476.

The *Long* presumption has been more recently reiterated. *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633 (1985).

There are, then, two requirements that must be met to trigger the *Long* presumption and invoke the jurisdiction of

the Supreme Court. First, the state court decision must "rest primarily" on or be "interwoven with" federal law. Second, the adequacy and independence of "any possible state law ground" must be unclear from the face of the opinion. *Id.*

In this case, the first requirement is not met. The decision of the Supreme Court, Appellate Division, Third Department neither rests upon nor is interwoven with federal law.

At issue is whether a wrongful death cause of action asserted on behalf of a stillborn fetus was properly dismissed in a state court. The parties agree that the law of New York is absolutely consistent. No wrongful death cause of action exists on behalf of a stillborn fetus. *See Endresz v. Friedberg*, *supra*, at 482-87; *Tebbutt v. Virostek*, 65 NY2d 931, 933 (1985); *Raymond v. Bartsch*, 84 AD2d 60 (3d Dept. 1981), *lv denied* 56 NY2d 508 (1982). The Appellate Division, Third Department affirmed the lower court decision without any reliance on or reference to federal law:

> [w]hile plaintiffs raise several interesting arguments in support of their claim that the law should be changed, this court has stated before that reconsideration of the law established in *Endresz v. Friedberg*, (*supra*) 'must be addressed to the Legislature or the Court of Appeals' (*Raymond v. Bartsch*, *supra*). Accordingly, we cannot conclude that the wrongful death cause of action was inappropriately dismissed (*See*, *Indilicato v. Bellevue Maternity Hosp.*, 108 AD2d 997 [3d Dept. 1985]).

Further, the decision of the Appellate Division was not "interwoven" with federal law. *Long*, *supra*, 463 U.S. at 1041, 103 S.Ct. at 3476. Unequivocally, the decision of the Third Department is neither formulary nor obfuscatory in its

rationale. *Compare, Ylst v. Nunnemaker,* 111 S.Ct. 2590, 2594 (1991) (the problem faced by the Supreme Court in applying the independent and adequate state ground doctrine arises when attribution of the reason underlying the decision of the court below is difficult and artificial).

The decision affirming the denial of a right of recovery under New York's wrongful death statute by the personal representative of a stillborn fetus which dies as a result of injuries sustained while *en ventre sa mere* is based upon a long line of state precedent construing New York's wrongful death statute to reject similar claims. *See Endresz v. Friedberg, supra*; *Indilicato v. Bellevue Maternity Hospital, supra*; *Raymond v. Bartsch, supra*. None of those decisions either rest squarely on federal law or make mention of federal law. Thus, there is no issue of federal law implicated in New York's interpretation of its wrongful death statute to be inferred from EPTL § 5-4.1 or the case law construing the statute.

A STILLBORN FETUS DOES NOT HAVE THE LEGAL PERSONALITY NECESSARY TO CHALLENGE NEW YORK'S WRONGFUL DEATH STATUTE

Petitioners fail to address the independent and adequate state ground doctrine in the argument contained in their Petition. Instead, they argue that the Supreme Court has jurisdiction over this case because "[t]he *Endresz* and *Tebbutt* cases are constitutionally wrong". This is so, Petitioners argue, because the United States Supreme Court has declared that a woman's right to terminate an unwanted pregnancy "only exists in pre-viability cases."

Petitioners fail to grasp the import of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. It has been clearly established only that the state may not interfere with a woman's right to terminate her pregnancy before the fetus has attained viability. *Id.*, 410 U.S. at 163. In a recent partial reaffirmation of the *Roe* case, the Supreme Court was careful to neither confer nor require legal personality for fetuses that are deemed viable. "[S]ubsequent to viability, the state in promoting its interest in the potentiality of human life may, *if it chooses*, regulate, and even proscribe abortion except where necessary in appropriate medical judgment, for the preservation of the life of the mother." *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2821 (1992) (*citing Roe v. Wade*, 410 U.S. 113, 164) (emphasis supplied); *See also Ryan v. Beth Israel Hospital*, 96 Misc.2d 816, 409 N.Y.S.2d 681 (1978).

It should be further noted that in nearly every instance in the United States Constitution the use of the word "person" has not included stillborn infants. *Roe v. Wade*, *supra*, 410 U.S. at 158. Moreover, the Supreme Court has unequivocally ruled that the word "person", as used in the Fourteenth Amendment, does not include the unborn. *Roe v. Wade, supra*, 410 U.S. at 158; *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), *cert. denied Illinois Pro-Life Coalition, Inc. v. Keith*, 474 U.S. 980 (1985).

Federal law compels no decision on the question of whether to allow a cause of action under New York's wrongful death statute by the personal representative of a stillborn fetus. There can be, then, no issue of federal law germane to the resolution of this question. The decision properly lies with the New York Legislature and Court of Appeals. *See Endresz v. Friedberg*, 24 NY2d 478; EPTL § 5-4.1.

The New York Court of Appeals has addressed the question of whether Petitioners appeal directly involves any constitutional issues. In earlier proceedings in this action, Petitioners sought an appeal as of right to the Court of Appeals of New York pursuant to CPLR § 5601(b)(1). Such appeals will be allowed only from an order of the Appellate Division which finally determines an action where there is directly involved a substantial constitutional (New York or federal) question. *Hartnett v. Ballston Spa*, 75 NY2d 863 (1990); *Fine v. City of New York*, 75 NY2d 863 (1990).

In cases where the decision of the Appellate Division was or may have been based on grounds not involving constitutional construction, no appeal as of right will lie pursuant to CPLR § 5601(b)(1). In one such case involving statutory construction issues and claims argued to be rooted in federal law New York's highest court wrote "[t]he core of the Appellate Division decision was its construction of the pertinent statutes. While the Court went on to find the Supreme Court's order . . . would contravene the Establishment Clause . . . [t]he constitutional discussion . . . appears to have been incidental to the Appellate Division holding." *Bd. of Education v. Weider*, 72 NY2d 174, 182-83 (*citing Matter of Haydorn v. Carroll*, 225 NY 84 [1918]). In their decision dated September 14, 1993 denying Petitioners' appeal as of right, the Court of Appeals based its decision "upon the ground that no substantial constitutional question is directly involved." (Petitioner's Appendix, 4)

THERE IS NO BASIS TO DISTURB THE EDIFICE OF NEW YORK PRECEDENT REFUSING TO ALLOW THE PERSONAL REPRESENTATIVE OF A STILLBORN FETUS A CAUSE OF ACTION FOR WRONGFUL DEATH

This issue sought to be addressed by Petitioners is clearly one of statutory construction. The wrongful death cause of action was legislatively created in 1847. *Gonzales v. New York Housing Authority*, 77 NY2d 663 (1991). In 1969, the seminal case, *Endresz v. Friedberg*, *supra*, was decided. The *Endresz* court traced the legislative and judicial history of New York's wrongful death statute. Their review failed to disclose any precedent to extend a wrongful death cause of action to the personal representative(s) of a stillborn fetus. The cases since *Endresz* have echoed its pronouncement. *See Byrn v. NYC Health and Hospitals Corporation*, 31 NY2d 194 (1972); *Tebbut v. Virostek*, 65 NY2d 931 (1985); *Raymond v. Bartsch*, *supra*; *Indilicato v. Bellevue Maternity Hospital*, *supra*.

In affirming the dismissal of Petitioners' wrongful death cause of action on behalf of the stillborn fetus, the Appellate Division, Third Department, relied on two of its prior decisions, *Indilicato v. Bellevue Maternity Hospital*, 108 A.D.2d 997 and *Raymond v. Bartsch*, 84 A.D.2d 60. In the *Indilicato* case, the Third Department affirmed the dismissal of a wrongful death cause of action for the wrongful death of an unborn child, citing *Endresz v. Friedberg*, 24 N.Y.2d 478. Four years prior, in the *Raymond v. Bartsch* case, the Third Department dismissed a similar cause of action for the wrongful death of an unborn child, again invoking the *Endresz* case. Justice Casey noted that "reconsideration of the

rule set forth in *Endresz* must be addressed to the Legislature or the Court of Appeals." *Raymond v. Bartsch, supra.*

The wrongful death statute and the *Endresz* decision remain consistent with the view that permeates the statutory and common law of New York. Legal personality is conferred at live birth.

For example, at common law the destruction of an unquickened fetus was not considered manslaughter. *Evans v. People*, 49 N.Y. 86 (1872). Further, a pregnant female who was sentenced to death would be executed unless the fetus had quickened. *See Byrn v. N.Y.C. Health and Hospitals Corp.*, 38 AD2d 316, 330 (2d Dept. 1972).

In addition, a criminal defendant cannot be charged with homicide in the death of an unborn fetus. This is so because the New York Legislature has excluded the unborn from the definition of "person" pertinent to homicide: "a human being who has been and is alive." Penal Law § 125.05(1); *See also People v. Hall*, 158 A.D.2d 69 (1st Dept. 1990).

Similarly, a woman consenting to a justifiable abortion cannot be a principal or an accomplice in the death of the fetus because the New York Legislature has not vested the fetus with legal personality. Were such legal personality conferred, criminal responsibility would, arguably, have to attach. Penal Law § 125.05 (1), (3); *See also Roe v. Wade*, 410 U.S. 113, 158 n.54 (1973).

The Court of Appeals has held that an unborn fetus is not a person beneficially interested in a trust such that their

consent need be obtained for revocation of that trust. *Matter of Peabody*, 5 N.Y.2d 541 (1959). The Court noted therein that an unborn fetus was not vested with legal personality until it was born alive. *Id.* at 547.

In general, the Court of Appeals has confirmed that it owes deference to consistent legislative determinations. In the absence of "a constitutional question, even the State's highest court may not refuse . . . to apply the plain import of an applicable statute, which, until and unless amended or repealed, must be respected as the law for all our people, no matter where positioned." *People v. Mackell*, 40 N.Y.2d 59, 64 (1976). Here the "plain import" of the applicable statute, particularly in view of the concurring legislative determinations in other areas of New York law, is that legal personality will be conferred, for purposes of maintaining a wrongful death cause of action, at live birth, not at viability. Should any reevaluation of New York's wrongful death statute need be undertaken, it is a task for the legislative branch of government. "[T]he perception and declaration of relevant public policy are best and most appropriately explored and resolved by the legislative branch of our government." *Murphy v. American Home Products Corporation*, 58 N.Y.2d 293 (1983).

It should be noted that precedents involving statutory interpretation are entitled to great stability. "After all, in such cases, courts are interpreting legislative intention and a sequential contradiction is a grossly arrogated legislative power. Moreover, if the precedent or precedents have 'misinterpreted' the legislative intention, the Legislature's competency to correct the misinterpretation is readily at hand." *People v. Hobson*, 39 N.Y.2d 479 (1976) (citing *Matter of Schinasi*, 277 N.Y. 252, 265-66 [1938]).

The doctrine of *stare decisis* "provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision." *People v. Bing*, 76 N.Y.2d 331 (1990). As interpreted by the Court of Appeals, *stare decisis* militates strongly in favor of adhering to the legislative determination and judicial precedent in New York which do not extend the wrongful death cause of action to the personal representative(s) of the alleged estate of a stillborn fetus. This approach to *stare decisis* taken by the Court of Appeals recognizes goals of "efficiency, predictability, and uniformity." Wachtler, *Stare Decisis and a Changing New York Court of Appeals*, 59 St. John's Law Review 445, 446 (1985).

In this case, to allow a wrongful death action to be brought on behalf of a stillborn fetus would be to confer legal personality at a point in time prior to live birth. Such a change would be a radical departure from precedent as well as from the scheme of the statutory and common law in New York. Any such change would have far reaching implications and should only be undertaken by the legislature.

Simply put, the legislative purpose of New York's wrongful death statute has not been frustrated by case law interpreting the statute. Federal law does not require any departure from New York's longstanding refusal to permit the personal representative of a stillborn fetus to sue for wrongful death. The state court decision is not, therefore, based on federal law. It has as its rationale and independent and adequate state grounds.

CONCLUSION

For the foregoing reasons, it is respectfully requested that certiorari be denied the Petitioners.

Respectfully submitted,

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